Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 76-193

October Term, 1976

FRED G. MORITT,

Petitioner,

-against-

MAURICE H. NADJARI, KENNETH R. WOLFE, WILLIAM FEDERICI, JOSEPH MULLIN, JAMES HIGGINS, ADAM BUTCHER, JULES SACHSON, HYMAN LIPSON, JOSEPH HIRSCHMAN, person intended being the Foreman of the Grand Jury, "JANE ROE," person intended being the Secretary of the said Grand Jury, EUGENE GOLD and NICHOLAS SCOPPETTA,

Respondents,

SAM ROBERTS and NEW YORK NEWS, INC.,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SAM ROBERTS and NEW YORK NEWS, INC.,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Fred G. Moritt prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit made and entered April 5,

1976 (Kaufman, Ch.J., Anderson and Meskill, JJ) reversing the order of the United States District Court for the Eastern District of New York (Chief Justice Jacob Mishler) dated August 28, 1975, and dismissing Petitioner's Civil Rights action against the Respondents, instituted pursuant to 42 USC 1983, 1985 and 1986. Petition for re-hearing and for re-hearing *en banc*, was denied on May 14, 1976.

OPINIONS BELOW

The order and memorandum decision of the United States District Court, Eastern District of New York (Chief Judge Jacob Mishler), dated August 28, 1975, is set forth in the appendix to this Petition (1a-9a).

The order and memorandum decision of the United States Court of Appeals for the Second Circuit, dated April 5, 1976, and order of modification thereof dated May 18, 1976, are set forth in the appendix to this Petition (10a-12; 13a).

The order and memorandum decision of the United States Court of Appeals denying rehearing, and denying rehearing *en banc*, are set forth in the appendix to this Petition (14a; 15a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254(1) and 28 USC 1343(3).

QUESTIONS PRESENTED

Did the United States Court of Appeals err in reversing the District Court on the issue of prosecutorial immunity, by improperly extending the scope of this Court's holding

in *Imbler v. Pachtman*, 96 S.Ct. 984 so as to embrace unconstitutional conduct wholly beyond permissible limits of prosecutorial duties, and in nowise associated with the judicial process?

Is a prosecutor entitled to absolute immunity from suit under 42 USC 1983, even where he conspiratorially placed himself beyond reach of a criminal prosecution for serious crimes committed by him against the Petitioner during the course of grand jury proceedings conducted by him?

Where a prosecutor deliberately thwarted and prevented the Petitioner from effecting a lawful citizen's arrest of Respondent state prosecutor for various crimes committed by him during the course of grand jury proceedings against the Petitioner, would such conduct be deemed within the scope of his duties as to entitle him to absolute immunity under the standards of this Court's holding in *Imbler v. Pachtman*, 96 S.Ct. 984?

Would an employee of a state prosecutor be entitled to the same blanket immunity against suit under 42 USC 1983, as is accorded to a prosecutor under *Imbler v. Pachtman?*

Is a conspiracy among a special state prosecutor, the local district attorney and the municipal police to prevent and thwart the Petitioner from effecting lawful citizen arrest of the special state prosecutor, one cognizable under 42 USC 1985 as an intentional and purposeful class-based discrimination to deprive the Petitioner of the equal protection of the laws?

STATUTES INVOLVED

The statutes involved are 42 USC 1983, 1985 and 1986, and are set forth in the Appendix hereof. (16a-17a)

STATEMENT OF THE CASE

The petitioner is a retired judge of the Civil Court of the City of New York, having served as a member of that Court from January 1, 1958 to January 20, 1975.

On April 17, 1974, the respondent Nadjari, a Special Deputy Attorney General, and his assistant, the respondent Wolfe, obtained an indictment in an Extraordinary Special and Trial Term of the Supreme Court of the State of New York, Kings County, charging the Petitioner in five counts, with the crimes of conspiracy in the third degree, grand larceny in the second degree, perjury in the first degree and tampering with a witness.

In substance, the conspiracy and grand larceny counts alleged that from September 18th, 1972 to January 24th, 1974, Judge Moritt's law secretary, Theodore Mann, (who was separately indicted for the same alleged offense) had "performed little or no work", and that Petitioner caused Mann "to be placed on the New York City payroll at a salary of $18,500. a year under the pretense that Mann would perform services as a Law Secretary".

Thereafter, Petitioner instituted various pre-trial proceedings in the state courts seeking dismissal of the indictment on constitutional and substantive grounds. Among these were motions to dismiss the indictment for gross prosecutorial misconduct shocking to the conscience and violative of due process of law, and to dismiss the indictment for lack of jurisdiction over the person and subject matter of the indictment by the respondent Nadjari. Several of these proceedings are currently pending.

On April 14, 1975, the Petitioner instituted a civil rights action in the United States District Court for the Eastern

District of New York, pursuant to 42 USC 1983, 1985 and 1986, in a three-count complaint for compensatory and punitive damages against the Respondents for wilful deprivation of petitioner's constitutional rights violative of due process of law and the equal protection of the laws.

The complaint is set forth in the Appendix to this Petition (20a-35a).

The named defendants therein were Respondents Nadjari, his assistant Wolfe, who conducted the grand jury proceedings; Federici, Nadjari's public relations officer, who served under temporary loan as such by the Defendant New York News Inc., publisher of the Daily News; Sam Roberts, a reporter for the Daily News, acting in concert with Federici and the Daily News; police officers Mullin, Higgins, Butcher, Sachson and Lipson; District Attorney Eugene Gold of Kings County; New York City Commissioner of Investigation Nicholas Scoppetta; Hirschman and "Jane Roe", foreman and secretary of the grand jury, respectively, that handed up the indictment against Petitioner.

The *first count*, under 42 USC 1983, alleged that the Respondents Nadjari and Wolfe, in complete bad faith and acting wholly beyond their lawful jurisdiction, deliberately suppressed vital and material exculpatory evidence in the Grand Jury, consisting of evidence, gathered and obtained from disinterested and reliable sources including the Administrative Judge of the Civil Court, various judges and court personnel, which if fairly and duly presented to the Grand Jury, would have completely exculpated and exonerated the petitioner of the false and baseless allegations contained in the indictment; wilfully caused the Petitioner to be unlawfully arrested without probable cause; wilfully enticed and deceived the Grand Jury into

accusing the petitioner of a baseless charge of "perjury" and "tampering" with a witness; wilfully tricked and deceived the Petitioner into executing a purported waiver of immunity, and altered and forged the "waiver" of immunity after it had been signed by Petitioner; wilfully stampeded his special grand jury into voting an indictment against him by deliberately planting false and prejudicial statements in the news media; and wilfully thwarted and obstructed the Petitioner's absolute right to effect a citizen's arrest of the Respondents Nadjari and Wolfe for the crimes and offenses committed by them against Petitioner prior to and during the course of the grand jury proceedings.

The *Second Count* of the complaint, pleading a cause of action under 42 USC 1985, alleged that the Respondents did maliciously, unlawfully, wilfully, venally, oppressively conspire with certain specified high-ranking police officials to set up and frame Judge Moritt, and to impede, obstruct, hinder and defeat the due course of justice in the County of Kings, State of New York with intent to injure Petitioner and his property for lawfully enforcing or attempting to enforce his right to the equal protection of the laws, in that the said Respondents, by trick and device, and by fraud and deception did deliberately prevent, impede, sabotage and defeat the Petitioner's lawful right and privilege to arrest the Respondents Nadjari and Wolfe for the crimes committed by them against Petitioner, prior to, during and after the grand jury proceedings, as follows:

Forgery (Penal Law 170.10, 170.25); Official Misconduct (Penal Law 195.00); Hindering Prosecution (Penal Law 205.50); Conspiracy (105.10); Offering a False Instrument (Penal Law 175.35); Tampering with Physical Evidence (Penal Law 175.25); Coercion (Penal Law 135.60); Criminal Solicitation (Subornation of Perjury

(Penal Law 100.00)); Obstructing Governmental Administration (Penal Law 195.05); Criminal Facilitation (Penal Law 115.00); Unlawful Imprisonment (Penal Law 135.00); Unlawful Disclosure of an Indictment (Penal Law 215.75); Unlawful Grand Jury Disclosure (Penal Law 215.70); Wilful Deprivation of Constitutional Rights (18 United States Code 242); Conspiracy Against Rights of Citizens (18 United States Code 241), among others.

The *Third Count* of the complaint, under 42 USC 1986, alleged that the Respondent police officers Mullin, Higgins, Butcher, Sachson, Lipson, and the Respondents Commissioner of Investigation Scopetta, and District Attorney Gold of Kings County, with full knowledge of the wrongs done, and conspired to be done, and about to be committed against the Petitioner as aforesaid, and having power to prevent or aid in preventing the commission of the same, and by reasonable diligence could have prevented, did wrongfully refuse and neglect so to do and Petitioner suffered serious damage thereby.

On May 5, 1975, the respondents Nadjari, Wolfe, Federici, Hirschman and "Roe" moved the District Court to dismiss the complaint on the ground that the Court lacked jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief can be granted.

The Corporation Counsel of the City of New York moved to dismiss on behalf of the Municipal Respondents Mullin, Higgins, Butcher, Sachson, Lipson and Scoppetta. The Attorney General of the State of New York moved to dismiss on behalf of the Respondent Gold.

Following oral argument before Chief Judge Mishler on July 18, 1975, the District Court rendered its decision and order of August 27, 1975, dismissing the First Count as to

Respondents Hirschman and "Roe"; denying dismissal as to the Respondents Nadjari, Wolfe, Federici, Mullin, Higgins, Butcher and Sachson; and granting dismissal of the Second and Third Counts of the complaint. The Order and Memorandum Decision of ChJ. Mishler is set forth in the Appendix herein: (1a-9a).

In sustaining the First Count as to the Respondent prosecutors, the District Court held:

> "If the plaintiff is able to prove the truth of the allegations of prosecutorial misconduct contained in count 1, officials such as Nadjari and Wolfe, and the other defendants charged in count 1 should not be permitted to escape responsibility for their misconduct by hiding behind the shield of immunity." (5a).

The Petitioner cross-appealed from the dismissal of the First Count as to the Respondents Joseph Hirschman and "Jane Doe" Foreman and Secretary respectively of the grand jury; and from the dismissal of the Second (42 USC 1985) and Third Counts (42 USC 1986).

On April 5, 1976, the United States Court of Appeals for the Second Circuit (Kaufman, Ch.J., Anderson, Meskill, JJ), reversed the order and judgment of the District Court, insofar as it had sustained the First Count of the complaint as to the Respondents Nadjari, Wolfe and Federici, upon the ground that the Respondent's civil rights action brought pursuant to 42 USC 1983 was barred by this Court's holding in *Imbler v. Pachtman,* 96 S.Ct. 984 (10a-12a).

On May 14, 1976, the Court of Appeals denied the Petition for a rehearing, and for rehearing *en banc* (14a; 15a).

REASONS FOR GRANTING THE WRIT

The Petition for a Writ of Certiorari herein presents several questions of vital significance bearing directly on policy considerations affecting the sound administration of criminal justice, and the just application of the civil rights act. (42 USC 1983, 1985 and 1986).

A

The clearly unconstitutional conduct alleged in the complaint at bar presents the issue squarely whether such conduct is deemed within the scope of the official duties of the respondent prosecutors, warranting blanket immunity within the contemplation of *Imbler v. Pachtman,* 96 S.Ct. 984.

Contrastingly different from the factual pattern of unconstitutional suppression of evidence permeating the Respondents' actions at bar, *Imbler v. Pachtman* presented the case of a prosecutor who had voluntarily uncovered exculpatory and impeaching evidence favorable to the defendant following his conviction—moving the latter's counsel, in a brief to the Supreme Court of California, to laud the prosecutor's fairness and objectivity as a premier example of "devotion to duty".

Further, in *Imbler,* the majority of this Court went only so far as to conclude, as to the alleged suppression of evidence regarding the background of the People's chief identifying witness, that the prosecutor Pachtman "had cause to suspect its falsity although, apparently, no actual knowledge thereof." (ff.8).

To so apply *Imbler* as to extend to the outrageous prosecutorial misconduct presented at bar, would make

Imbler bad law as applied to this case, and which, with the utmost deference, this Court had never intended.

The striking differentiation between the unconstitutional conduct alleged in the case at bar, as compared to *Imbler*, is accentuated in the separate concurring opinion of Mr. Justice White, joined by Mr. Justice Brennan and Mr. Justice Marshall, as follows:

> "I concur in the judgment of the Court and in much of its reasoning. I agree with the Court that the gravamen of the complaint in this case is that the prosecutor knowingly used perjured testimony; and that a prosecutor is absolutely immune from suit for money damages under 42 USC 1983 for presentation of testimony later determined to have been false, where the presentation of such testimony is alleged to have been unconstitutional solely because the prosecutor did not believe it or should not have been believed it to be true. I write, however, because I believe that the Court's opinion may be read as extending to a prosecutor an immunity broader than is necessary to decide this case; and broader than is necessary to protect the judicial process. Most seriously, I disagree with any implication that *absolute* immunity for prosecutors extends to suits based on claims of unconstitutional suppression of evidence because I believe such a rule would threaten to *injure* the judicial process and to interfere with Congress' purpose in enacting 42 USC Sec. 1983, without any support in statutory language or history."

B

Policy considerations uniquely present in the case at bar, addressed to the deterrence of prosecutorial misconduct, demand that the respondents be amenable to suit under Sec. 1983.

The Court pointedly noted in *Imbler*:

> "We emphasize that the immunity of prosecutors from liability in suits under Sec. 1983 does not leave the public powerless to deter misconduct or to punish that which occurs. *This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law.* Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 USC 242, the criminal analog of Sec. 1983. *** The prosecutor would fare no better for his willful acts. Moreover, a prosecutor stands unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime."

Here, the Petitioner Judge Moritt did, in fact, prior to and subsequent to his indictment, repeatedly demand the investigation and prosecution of the Respondents Nadjari and Wolfe by the named Respondents Eugene Gold, District Attorney of Kings County, the Commissioner of Investigation of the City of New York Nicholas Scoppetta, and by the Respondent New York City police officials. To date, these Respondents have deliberately refused to take any action, solely by reason of the conspiracy with the Respondent Special Prosecutor Nadjari, as specifically alleged in the complaint aforesaid.

The Petitioner Judge Moritt had likewise pleaded with his "peers" represented in the Brooklyn Bar Association to invoke disciplinary action against the Special Prosecutor,

but for two and one half years past to date, neither the Brooklyn Bar Association nor any other bar association within the City of New York having jurisdiction thereof initiated any disciplinary action whatever against the Respondent Nadjari, despite the notorious and repeated condemnation of his outrageous conduct by the highest courts (*Matter of Nigrone*, 46 App.Div.2d (NY) 343; *People v. Rao*, ____App.Div.2d____ (2d Dept., New York, July 20, 1976).

Here, the wanton thwarting by the Respondents of the Petitioner's unqualified right to effect a citizen's arrest of the Respondent prosecutors for horrendous crimes committed by them against Petitioner throughout the course of the grand jury proceedings against him, constituted police-related conduct wholly beyond the scope of Respondents' official duties as state prosecutors, or which by any *Imbler* test, could be deemed "intimately associated with the judicial phase of the criminal process."

Unlike *Imbler*, the Respondents' activities at bar cast them in the role of an administrator or investigative officer or policeman rather than that of advocate, and are therefore not entitled to immunity from suit under Sec. 1983.

In this connection, it is poignant to note that the Respondent Nadjari is the same person who had stirred widespread concern in numerous cases as a lawless prosecutor, criticized and denounced by the highest courts for "illegal, outrageous and intolerable" tactics of law enforcement (*Matter of Nigrone*, 46 App. Div. 2d (NY) 343), engendering the editorial disapproval by the *New York Times*, "concerning Mr. Nadjari's ability, his methods, his attitude toward civil liberties ***" (June 12, 1976), finally causing termination of his tenure and his summary dismissal by the Governor of the State of New York, with the concurrence of the Attorney General, ef-

fective June 29, 1976, because of "a perceptible decline in public confidence." United States Attorney David G. Trager publicly stated of the Respondent Nadjari: "No prosecutor trusts or respects him, professionally or personally. Mr. Nadjari has no credibility in law enforcement." (*New York Times Magazine*, March 28, 1976, p. 1).

To accord an unqualified immunity to the Respondent prosecutors in the extraordinary situation at bar would eliminate all restraints whatever to deter misconduct, and would invite grave tyrannical excesses of prosecutorial power wholly intolerable to a free society. Under these circumstances, considerations of public policy demand that no blanket immunity be accorded the respondents at bar.

C

The Court of Appeals erred in applying the principle of prosecutorial immunity not only to Respondents Nadjari and Wolfe, but also to the Respondent Federici, an employee of the prosecutor serving merely in the capacity of Chief Public Relations Officer. By this unwarranted extension of the scope of the Court's holding in *Imbler v. Pachtman*, *supra*, the judicial precedents of *Scheuer v. Rhodes*, 416 US 232 and *Monroe v. Pape*, 365 US 167 have been seriously eroded and undermined.

In any view, immunity is inapplicable to Federici under the very standards enunciated by this Court in *Imbler*. The gross misconduct of Respondent Federici was by no means associated with "the judicial phase of the criminal process", but rather, was of an administrative character, as readily appears as in the First Count of the complaint, as follows:

"The defendants Nadjari, Wolfe, Federici, Roberts and the Daily News, individually and in concert with each other, did further maliciously and wilfully deprive the plaintiff of his rights, privileges and immunities secured by the Constitution and the Laws of the United States by deliberately planting and disseminating into the news media, more particularly, in the columns of the defendant Daily News, a pattern of false, prejudicial and inflammatory news releases and newspaper stories, during the sitting of the Grand Jury and long prior to the finding of any indictment against the plaintiff as aforestated, namely that he, various members of his staff, and other unnamed judges and other public servants, had committed various crimes including bribery and larceny; that his Law Secretary was a "no show" individual; that the plaintiff had been "removed" from office by the Presiding Justice of the Appellate Division; that he had been "suspended" from his duties as a Civil Court Judge; that he had been "indicted" by the grand jury for the alleged crimes based on the unfounded rumors aforesaid; all with the pernicious object and design to generate a prejudicial climate of hostility, rancor and guilt against the plaintiff, as well as against other judges and public officials, and to poison the minds of the citizenry grand jurors and potential petit jurors against the plaintiff and his Law Secretary, and other public servants, into voting a baseless indictment against the plaintiff, as well as his Secretary, as aforestated." (20a).

D

The District Court erred in dismissing the Petitioner's Second and Third Counts (42 USC 1985 and 1986). The Petitioner's cross-appeal on this issue was implicitly dismissed by the Court of Appeals (10a-11a).

The Second Count of the Complaint alleged that the Respondent deprived Petitioner of his right to the equal protection of the law by conspiring to prevent, obstruct and defeat the Petitioner's lawful right and privilege to effect a citizen's arrest of the respondents Nadjari and Wolfe for the crimes committed by them during the grand jury proceedings.

We respectfully submit that Petitioner established an intentional and purposeful conspiracy by the respondents to impede, obstruct and defeat his right to effect a class-based citizen's arrest for the crimes committed against him during the Grand Jury proceedings aforesaid, and effectively deprived Petitioner, as a member of a class so entitled, of the equal protection of the laws. (*New York Criminal Procedure Law*, Sections 140.30, 140.35 and 140.40). (17a-19a), and has here met the test of "intentional and purposeful discrimination." (*Snowden v. Hughes*, 321 US 1), and a "class-based invidiously discriminatory animus" (*Griffin v. Beckenridge*, 403 U.S. 88, 102 (1971).

The Petitioner's right to effect a citizen's arrest at bar, *predicated upon conceded probable cause*, was absolute under New York law. (17a-19a). The complaint specifically alleged that "the defendants Lieut. Higgins and Lieut. Mullin informed the Petitioner that he had established sufficient evidence and probable cause to effect the arrest, and that they would arrest the defendants Nadjari and Wolfe forthwith", but that subsequently, however, the Respondents unlawfully conspired to frustrate and prevent the arrest. (28a).

Instead, Judge Moritt was conspiratorially kept in the 84th Police Precinct for five hours, on a fraudulent pretense by the local police to act on his written complaint

and to arrest the Respondents Nadjari and Wolfe thereon. Meanwhile, Special Prosecutor Nadjari acting in concert with the police, hastily convened his special grand jury and procured an indictment against Petitioner. Thus, Judge Moritt—a jurist with an impeccable record of integrity extending over 37 years in public life, as a State Senator, Assemblyman and senior Judge of the Civil Court—found himself in the prisoner's dock, instead of the Respondents Nadjari and Wolfe.

The Court was required to take as true all the allegations of the complaint, and all reasonable factual inferences flowing therefrom (*Cruze v. Beto*, 405 US 319, 322; *Scheuer v. Rhodes*, 416 US 232; *Conley v. Gibson*, 355 US 41, 45).

The right of a private citizen to effect an arrest on probable cause has long been recognized in the common law. (*Kurtz v. Moffitt*, 115 US 487, 504 (1885); *United States v. Watson*, ____ US ____, January 27, 1976, 18 CrL 3051; *United States v. Gowen*, 40 F.2d 593 (CA 2, 1930), revd on other gr. 282 US 342). It is clearly a "right or privilege of a citizen of the United States", within the meaning and contemplation of Sec. 1986.

Accordingly, given the absolute right of Petitioner to effect the arrest of the Respondent prosecutors at bar, the wilful deprivation of that constituted a conspiracy in denial of the equal protection of the laws cognizable under 42 USC 1986.

As to the Respondent *Eugene Gold, District Attorney of Kings County*, the complaint specifically alleged in the Conspiracy Count Two, that "By reason of the facts aforestated, (Count One), the defendant Gold did wantonly fail to present the evidence hereinabove set forth to the

grand jury, and did wilfully shield, protect, immunize the cover up the defendants Nadjari and Wolfe for the crimes committed by them as aforesaid, all in flagrant violation of his duty and responsibility as the District Attorney of Kings County, and in wanton deprivation of plaintiff's constitutional right to the equal protection of law."

The allegations as to the Respondent *Scoppetta* were substantially the same. In that deliberate cover up, the Respondent Gold (as well as Scoppetta), became full fledged partners in the conspiracy against the Petitioner to deprive him, with purposeful discrimination, of the equal protection of the laws.

The District Court erred in dismissing the Third Count, holding that since Petitioner has failed to state a claim under Sec. 1985, the derivative Third Count pleaded under Sec. 1986 must likewise be dismissed. As aforenoted, however, the Petitioner did adequately state a cause of action under Sec. 1985 and, accordingly, both the Second and Third Counts should have been reinstated against the Respondents.

In sum, we respectfully submit that the Courts below erred in dismissing the counts as to all respondents, alleging deprivation of constitutional rights under 42 USC 1985 and 1986 and that a writ of certiorari should issue by this Court to review the same.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: August 5, 1976

APPENDIX A

MEMORANDUM OF DECISION AND ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FRED G. MORITT,

Plaintiff,

-against-

MAURICE H. NADJARI, KENNETH R. WOLFE, WILLIAM FEDERICI, SAM ROBERTS, NEW YORK DAILY NEWS, INC., JOSEPH MULLIN, JAMES HIGGINS, ADAM BUTCHER, JULES SACHSON, HYMAN LIPSON, JOSEPH HIRSCHMAN, person intended being the Foreman of the Grand Jury, "JANE ROE", person intended being the Secretary of the said Grand Jury, EUGENE GOLD and NICHOLAS SCOPPETTA,

Defendants.

MISHLER, CH. J. August 27, 1975

The plaintiff, Fred G. Moritt, is a Judge of the Civil Court of the City of New York. On April 17, 1974, he was indicted by the November 1972 Extraordinary and Special Grand Jury of Kings County on charges of conspiracy in the

third degree, grand larceny in the second degree, perjury in the first degree (two counts), and tampering with a witness. The charges arose out of an investigation being conducted by Special State Prosecutor Maurice H. Nadjari and an assistant, Special Assistant Attorney General Kenneth R. Wolfe, into the status of one Theodore Mann, employed by Moritt ostensibly as his law secretary.

Moritt brought two actions in the state courts in an attempt to halt the proceedings against him. In the first action, the Appellate Division, Second Department denied plaintiff's motion to dismiss the indictment, *Moritt v. Nadjari*, 46 App. Div. 2d 784 (2d Dept. 1974). An Article 78 proceeding to prohibit prosecution on the indictment was similarly dismissed, *Moritt v. Extraordinary Special and Trial Term of Supreme Court, County of Kings*, 46 App. Div. 2d 1012 (2d Dept. 1974). Moritt subsequently instituted the present action alleging claims under 42 U.S.C. §§1983, 1985 and 1986, and seeking compensatory damages in the amount of $10,000,000 and punitive damages in the same amount. The defendants Nadjari, Wolfe, Federici, former Director of Communications and Special Projects for the Special State Prosecutor, Hirschman and Roe, two members of the Grand Jury, move pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Eugene Gold, District Attorney for Kings County, moves to dismiss on the same grounds. Defendants Mullin, Higgins, Butcher, Sachson, Lipson, Members of the Police Department of New York City, and Scopetta, Commissioner of Investigation of the City of New York, move to dismiss solely on the ground that the complaint fails to state a claim upon which relief can be granted.

COUNT 1

Count 1 of the complaint makes numerous allegations of a deprivation of plaintiff's rights, privileges and immunities under the Constitution and laws of the United States in contravention of 42 U.S.C. §1983.[1] The plaintiff charges first of all that Nadjari and Wolfe suppressed and concealed from the Grand Jury certain material, exculpatory evidence, and then produced before the Grand Jury witnesses who had no knowledge of the events in question.[2] The complaint also alleges that Nadjari and Wolfe concealed from the Grand Jury the information that the acts charged against the plaintiff were not indictable offenses under New York's penal laws. The complaint further states that Moritt was prevented from making statements of his own before the Grand Jury and from calling witnesses in his own behalf. Nadjari and Wolfe allegedly tricked the plaintiff into executing a waiver of immunity and then allegedly altered the contents of that waiver. Nadjari, Wolfe, Federici, Roberts, a reporter for the *New York Daily News*, are accused in the complaint of planting and disseminating "false, prejudicial and inflammatory news releases and newspaper stories." Finally, the complaint alleges that Nadjari, Wolfe, and four members of the New York City Police Department, Mullin, Higgins, Butcher and Sachson arrested the plaintiff without probable cause and before the indictment had been

1. Section 1983. *Civil action for deprivation of rights.*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. Lipson, Gold and Scoppetta are not named in Count 1.

handed up by the Grand Jury. The arrest allegedly was effected solely for the purpose of preventing Moritt from himself arresting Nadjari and Wolfe.

The question raised by the defendants is whether this complaint describes a deprivation of rights to which the plaintiff is entitled under the Constitution and laws of the United States so as to bring the action within the confines of 42 U.S.C. §1983. The defendants argue that none of the rights which have allegedly been violated are rights guaranteed to the plaintiff by the Constitution. But at least some of plaintiff's allegations have been recognized as sufficient under §1983. Among these are suppression of evidence, *Hilliard v. Williams,* 465 F.2d 1212 (6th Cir. 1972), *cert. denied,* 409 U.S. 1029, 93 S.Ct. 461; intentional abuse of the prosecutorial role including misuse of the Grand Jury, *Haaf v. Grams,* 335 F. Supp. 542 (D. Minn. 1973); possible unlawful arrest, *Nesmith v. Alford,* 318 F.2d 110 (5th Cir. 1963), *cert. denied,* 375 U.S. 975, 84 S.Ct. 489 (1964); *Rue v. Snyder,* 249 F. Supp. 740 (E.D. Tenn. 1966). While not all of the allegedly violated rights are of constitutional dimensions, as for example, the allegedly prejudicial press releases, *Martin v. Merola,* 389 F. Supp. 323 (S.D.N.Y. 1975), nevertheless the preponderance of the charges in Count 1 do allege sufficient constitutional violations to state a claim under §1983.

The standard against which a complaint should be measured in a motion to dismiss has been stated by the Supreme Court in *Conley v. Gibson,* 355 U.S. 41, 45, 78 S.Ct. 99, 102 (1957):

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Plaintiff's complaint may be inartfully pleaded and the possibility of ultimate success may be remote, but a complaint should not be dismissed for those reasons. It is not impossible, however unlikely, that plaintiff will be able to prove some set of facts which will support his claims.

The defendants also argue that the complaint can not stand because of a lack of subject matter jurisdiction, specifically that the defendants are immune from suit because of their official positions. Prosecutors are regarded as immune from suits arising out of acts done in their official capacities, *Bauers v. Heisel,* 361 F.2d 581 (3d Cir. 1966), *cert. denied,* 386 U.S. 1021, 87 S.Ct. 1367 (1967). However, that immunity is not absolute, but only qualified, *Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683 (1974). A claim of immunity will be particularly strictly interpreted in a civil rights complaint because of the remedial nature of the action. *Jobson v. Henne,* 355 F.2d 129 (2d Cir. 1966). The immunity will not extend to improper acts, acts which are in effect outside the scope of the official's authority. *Kauffman v. Moss,* 420 F.2d 1270 (3d Cir. 1970); *cert. denied,* 400 U.S. 846, 91 S.Ct. 93; *Bauers v. Heisel, supra.* If the plaintiff is able to prove the truth of the allegations of prosecutorial misconduct contained in count 1, officials such as Nadjari and Wolfe, and the other defendants charged in count 1 should not be permitted to escape responsibility for their misconduct by hiding behind the shield of immunity. Hirschman and "Jane Roe" on the other hand, as foreman and secretary of the Grand Jury respectively, performed a judiciary function and are therefore immune from suit. *Martone v. McKeithen,* 413 F.2d 1373 (5th Cir. 1969).

The motion to dismiss count 1 of the complaint for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction is granted as to

defendants Hirschman and "Jane Roe", and denied as to defendants Nadjari, Wolfe, Federici, Mullin, Higgins, Butcher and Sachson.[3]

COUNT 2

Count 2 apparently alleges violations of 42 U.S.C. §1985.[4] It charges the various New York City police officers Mullin, Higgins, Butcher, Sachson and Lipson, with delaying and impeding plaintiff's attempts to arrest Nadjari and Wolfe. The complaint further alleges that plaintiff was taken from his home and held in Nadjari's

3. Defendants Roberts and the *New York Daily News, Inc.* have not attacked the sufficiency of Count 1.

4. Section 1985. *Conspiracy to interfere with civil rights—Preventing officer from performing duties*

* * *

Obstructing justice; intimidating party, witness or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; . . .

(3) . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

office for eight hours before being arraigned. Scoppetta is alleged to have defeated plaintiff's right to equal protection of the laws by failing to investigate plaintiff's complaint against the other defendants. District Attorney Gold is similarly charged with having failed to take any action against Nadjari and Wolfe in spite of plaintiff's presentation of evidence to Gold and with, in fact, shielding Nadjari and Wolfe from any prosecution of their improper acts.

A proper claim under §1985 depends upon a showing of deprivation of equal protection of the laws. The plaintiff must allege that the violator of his rights acted with "a racial, or class-based invidiously discriminatory animus," *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798 (1971). The decisions of Scopetta or Gold not to investigate or prosecute were purely discretionary decisions, as were the decisions of the police officers not to arrest Nadjari and Wolfe. Moritt has not shown that this exercise of discretion in any way deprived him of equal protection of the laws. He has not shown that he is the only person to be treated as he was or that other citizens would be treated any differently. *Scolnick v. Winston*, 319 F.Supp. 836 (S.D.N.Y. 1963). Plaintiff's complaint simply fails to meet the requirements of §1985; there is no set of facts which plaintiff could prove which would sustain a claim under §1985.

The motion to dismiss the complaint for failure to state a claim upon which relief can be granted is granted as to Count 2.

COUNT 3

Count 3 of the complaint ostensibly states a claim under 42 U.S.C. §1986.[5] It charges the same defendants as those named in count 2 with refusing to prevent the wrongs being done to the plaintiff when it was within their power to do so. The maintenance of a claim under §1986 is dependent on the existence of a valid claim under §1985; the §1986 claim is only derivative. *Johnson v. National Broadcasting Company, Inc.*, 356 F. Supp. 904 (E.D.N.Y. 1973); *Post v. Payton*, 323 F. Supp. 799 (E.D.N.Y. 1971). Plaintiff has failed to state a claim under §1985. Accordingly, count 3 of his complaint, based on §1986, must also be dismissed.

The motion to dismiss the complaint is granted to the extent that count 1 is dismissed against Hirschman and "Jane Roe", and denied as to defendants Nadjari, Wolfe, Federici, Mullin, Higgins, Butcher and Sachson; the motion to dismiss counts 2 and 3 is granted, and it is

SO ORDERED.

The Clerk of the Court is directed to enter judgment in accordance with the above. There is no just reason for delay in the entry of this judgment in favor of defendants Hirschman, "Jane Roe", Gold, Scopetta and Lipson, and the action shall proceed against the remaining defendants.

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5. Section 1986. *Same; action for neglect to prevent*

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; . . .

The sufficiency of Count 1 presents a substantial ground for difference of opinion. It is anticipated that the trial will involve many complex issues involving the investigating procedures employed by the Special Prosecutor. An immediate appeal may materially advance the ultimate termination of the litigation (28 U.S.C. §1292(b)).

s/Jacob Mishler
U.S.D.J.

APPENDIX B

ORDER DATED APRIL 5, 1976

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of April one thousand nine hundred and seventy-six.

Present:

Hon. Irving R. Kaufman. Chief Judge
Hon. Robert P. Anderson
Hon. Thomas J. Meskill, Circuit Judges

FRED G. MORITT,

Plaintiff-Appellee-Appellant,

v.

MAURICE H. NADJARI, KENNETH R. WOLFE and WILLIAM FEDERICI,

Defendants-Appellants-Appellees,

SAM ROBERTS and NEW YORK NEWS, INC.,

Defendants,

JOSEPH MULLIN, JAMES HIGGINS, ADAM BUTCHER, JULES SACHSON, HYMAN LIPSON, JOSEPH HIRSCHMAN, person intended being the Foreman of the Grand Jury, "JANE ROE", person intended being the Secretary of the said Grand Jury, EUGENE GOLD and NICHOLAS SCOPPETTA,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York, Jacob Mishler, Chief Judge.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part, reversed in part. We affirm that portion of Chief Judge Mishler's decision of August 27, 1975, that dismissed the complaint as against the foreman and secretary of the grand jury, and dismissed Counts 2 and 3 of the complaint, for the reasons stated in that decision.

We reverse the District Court's decision insofar as it denied motions to dismiss the remainder of the first count. The allegations therein of misconduct in the course of the grand jury proceedings, and of arrest (pursuant to a court-issued warrant) without probable cause, are barred by the Supreme Court's ruling in *Imbler v. Pachtman,* U.S. 44 U.S.L.W. 4250 (March 2, 1976). As to the allegation that prejudicial stories were disseminated to the news media, however, we feel compelled by our recent decision in *Martin v. Merola,* F.2d, slip op. at 6615 (February 5, 1976) to dismiss as premature that portion of the complaint without prejudice to its possible renewal at the conclusion of the state criminal proceedings, when a claim that a fair trial was thereby denied may be more fairly assessed.

s/Irving R. Kaufman
IIRVING R. KAUFMAN, Ch. Judge

s/Robert P. Anderson
ROBERT P. ANDERSON

s/Thomas J. Meskill
THOMAS J. MESKILL,
Circuit Judges

APPENDIX C

ORDER DATED MAY 13, 1976

At a State Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of May, one thousand nine hundred and seventy-six.

(SAME TITLE)

It is hereby ordered that the motion made herein by counsel for the appellant Fred G. Moritt, by notice of motion dated April 19, 1976 to modify the judgment of this court dated April 5, 1976 be and it hereby is granted

It is further ordered that the order of April 5, 1976 be modified to add, at the conclusion of the first sentence of the last paragraph, the following:

"as against appellants Nadjari, Wolfe, and Federici"

Irving R. Kaufman, Chief Judge

ROBERT P. ANDERSON

s/Thomas J. Meskill
THOMAS J. MESKILL Circuit Judges

APPENDIX D

ORDER DATED MAY 14, 1976

At a State Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of May, one thousand nine hundred and seventy-six.

Present:
HON. IRVING R. KAUFMAN, Chief Judge
HON. ROBERT P. ANDERSON,
HON. THOMAS J. MESKILL, Circuit Judges

(SAME TITLE)

A petition for a rehearing having been filed herein by counsel for the Plaintiff-Appellee-Appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

s/A. Daniel Fusaro
A. DANIEL FUSARO, Clerk

APPENDIX E

ORDER DATED MAY 14, 1976

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of May, one thousand nine hundred and seventy-six.

(SAME TITLE)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-Appellee-Appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

STATUTES

Title 42 United States Code

"Sec. 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

"Sec. 1985. Conspiracy to interfere with civil rights - Preventing officer from performing duties.

"(2)*** if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

"(3) If two or more persons in any State or Territory conspire *** for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all person within such State or Territory the equal protection of the laws; *** in

any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

"Sec. 1986. Action for neglect to prevent conspiracy.

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section (42 USCS Sec. 1985), are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevents; ***"

NEW YORK CRIMINAL PROCEDURE LAW

Sec. 140.30 Arrest without a warrant; by any person; when and where authorized

1. Subject to the provisions of subdivision two, any person may arrest another person (a) for a felony when the latter has in fact committed such felony, and (b) for any offense when the latter has in fact committed such offense in his presence.

2. ***

Sec. 140.40 Arrest without a warrant; by person acting other than as a peace officer; procedure after arrest.

1. A person making an arrest pursuant to section 140.30 must without unnecessary delay deliver or attempt to deliver the person arrested to the custody of an appropriate police officer, as defined in subdivision four. For such purpose, he may solicit the aid of any police officer and the latter, if he is not himself an appropriate police officer, must assist in delivering the arrested person to an appropriate officer. If the arrest is for a felony, the appropriate police officer must, upon receiving custody of the arrested person, perform all recording, fingerprinting and other preliminary police duties required in the particular case. In any case, the appropriate police officer, upon receiving custody of the arrested person, except as otherwise provided in subdivision two, must bring him, on behalf of the arresting person, before an appropriate local criminal court, as defined in subdivision four, and the arresting person must without unnecessary delay file an appropriate accusatory instrument with such court.

2. If (a) the arrest is for an offense other than a felony and (b) owing to unavailability of a local criminal court the appropriate police officer having custody of the arrested person is unable to bring him before such a court with reasonable promptness, the arrested person must be dealt with in the manner prescribed in subdivision three of section 140.20, as if he had been arrested by a police officer.

3. Notwithstanding any other provision of this section, a police officer is not required to take an arrested person into custody or to take any other action prescribed in this

section on behalf of the arresting person if he has reasonable cause to believe that the arrested person did not commit the alleged offense or that the arrest was otherwise unauthorized.

4. ***

APPENDIX "F"

COMPLAINT

PLAINTIFF DEMANDS TRIAL BY JURY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FRED G. MORITT,

Plaintiff,

-against-

MAURICE H. NADJARI, KENNETH R. WOLFE, WILLIAM FEDERICI, SAM ROBERTS, NEW YORK NEWS INC., JOSEPH MULLIN, JAMES HIGGINS, ADAM BUTCHER, JULES SACHSON, HYMAN LIPSON, JOSEPH HIRSCHMAN, person intended being the Foreman of the Grand Jury, "JANE ROE", person intended being the Secretary of the said Grand Jury, EUGENE GOLD and NICHOLAS SCOPPETTA,

Defendants.

JURISDICTION

1. This action arises under Title 42 United States Code, Sections 1983, 1985 and 1986.

2. The jurisdiction of this Court is grounded on Title 28 United States Code, Section 1343, to redress the deprivation under color of state law, of the rights, privileges and immunities secured to the plaintiff as a citizen of the United States by the Constitution of the United States, and the Statutes of the United States providing for equal rights and equal protection of all persons within the jurisdiction of the United States.

PARTIES

At all times hereinafter mentioned:

3. The plaintiff, Fred G. Moritt, is a citizen of the United States and a resident of the Eastern District of New York, and was a duly elected Judge of the Civil Court of the City of New York, State of New York, serving as such continuously since January 1, 1958, and that immediately prior thereto had served in the Legislature of the State of New York for 20 years.

4. The defendant Maurice H. Nadjari (hereinafter referred to as Nadjari) was a Special Deputy Attorney General of the State of New York designated and appointed by the Governor of the State of New York, under color of Section 63 Executive Law of the State of New York, and Executive Order No. 58 issued by the Governor on September 19, 1972, which directed and required the Attorney General to appear in person, or by one of his deputies, before the grand jury of the Extraordinary Term of the Supreme Court, County of Kings, State of New York, for the purpose of managing and conducting before such jury criminal actions or proceedings as specified in the Governor's requirement contained in the Executive Order aforesaid.

5. The defendant Kenneth R. Wolfe (hereinafter referred to as Wolfe) was a Special Deputy Attorney on the staff of the defendant Nadjari, acting together and in concert with, and under the direction and control of the defendant Nadjari, in the management and conduct of the grand jury proceedings aforesaid.

6. The defendant William Federici (hereinafter referred to as Federici) was an agent and employee of the defendant Nadjari as the Chief Press Agent and public relations officer, and upon information and belief, served as such under temporary loan to the defendant Nadjari from the defendant New York News Inc., the owner and publisher of the Daily News, a newspaper having one of the largest circulations in the state and nation (hereinafter referred to as the "Daily News").

7. The defendant Sam Roberts (hereinafter referred to as Roberts) was a reporter and columnist of the defendant Daily News, acting together and in concert with the defendant Federici and the Daily News.

8. The defendants Joseph Mullin, James Higgins, Adam Butcher, Jules Sachson and Hyman Lipson (hereinafter referred to by their surnames respectively) were police officers of the Police Department of the City of New York, charged with the duty to prevent crime, and to arrest persons guilty of violating any law or for the suppression or punishment of crimes or offenses.

9. The defendants Joseph Hirschman (hereinafter referred to as Hirschman) and "Jane Roe" were the Foreman and Secretary respectively of the Grand Jury, drawn for the Extraordinary Special and Trial Term of the Supreme Court, Kings County, State of New York, which Grand Jury handed up a certain indictment against the plaintiff, bearing No. S.P.O.K. 13/74 Kings County, on or

about April 17, 1974 under color of the Statutes and Executive Order aforesaid, purportedly charging him with the alleged crimes of Grand Larceny, Conspiracy, Perjury and Tampering with a Witness.

10. The defendant Eugene Gold (hereinafter referred to as Gold) was the District Attorney of the County of Kings, State of New York, whose duty it was to conduct investigations and prosecutions of all crimes and offenses cognizable by the courts of said County for which he had been elected.

11. The defendant Nicholas Scoppetta (hereinafter referred to as Scoppetta) was the Commissioner of Investigation of the City of New York, whose official duty and responsibility it was to investigate all allegations and acts of malfeasance, misfeasance, nonfeasance, and the commission of crimes, on the part of all agencies and public servants of and in the City of New York.

FIRST COUNT

12. For some time prior to during a period presently unknown to the plaintiff, and on or about and between March 13, 1974 and April 18, 1974, and continuing thereafter to the present time, the defendants did, under color of the statutes aforestated, maliciously, wilfully, wantonly, venally, oppressively and in complete bad faith, deprive the plaintiff of his rights, privileges and immunities secured by the Constitution and Laws of the United States, in manner and substance as follows:

a. The defendants Nadjari and Wolfe, acting individually and in concert with each other, and with divers other persons presently unknown to the Plaintiff, did wilfully withhold, suppress, cover up and conceal from the

grand jury vital and material evidence, within their individual and collective knowledge, consisting of evidence gathered and obtained from disinterested and reliable sources including the Administrative Judge of the Civil Court, various judges and court personnel, which if fairly and duly presented to the grand jury, would have completely exculpated and exonerated the plaintiff of the false and baseless allegations contained in the indictment.

b. The defendant Nadjari and Wolfe, acting individually and in concert with each other and with divers other persons presently unknown to the Plaintiff, did wilfully, fraudulently and deceitfully mislead the grand jury into setting up, framing and victimizing the Plaintiff with a baseless indictment against him, by wrongfully calling and producing certain alleged witnesses before the grand jury to testify concerning their purported knowledge of the facts pertaining to the Plaintiff and his law secretary, and as to their purported knowledge of events purportedly occurring in September 1974, of which events, however, the said witnesses neither had, nor could possibly have had, any knowledge or information whatsoever, as the said defendants well knew.

c. The defendants Nadjari and Wolfe further did wantonly, deceitfully and fraudulently withhold and conceal and suppress from the Grand Jury the critical evidence as to the applicable law governing the acts alleged in the indictment purportedly charging Plaintiff with the crimes of Grand Larceny and Conspiracy, in that to the defendants' own knowledge and understanding the said acts were in nowise criminal or otherwise improper under the prevailing law and practices, specifically in view of the explicit provisions of Article VI, Sec. 28 New York State Constitution, the statutes, and the Rules of the Ad-

ministrative Board of the Judicial Conference of the State of New York thereunder, and the said defendants did thereby wilfully withhold and conceal the essential information from the Grand Jury that the acts alleged against the Plaintiff in the indictment aforesaid did not constitute any indictable offense under the penal statutes of the State of New York.

d. The defendants Nadjari, Wolfe, Hirschman and "Jane Roe", did wilfully and wantonly prevent and gag the Plaintiff from exercising his lawful rights as a witness before the grand jury in his own behalf, and did effectively deprive and foreclose him, by means of unlawful and repeated threat of contempt, of a due and fair opportunity to be heard, or to give testimony or to call witnesses in his behalf, which if allowed, as authorized by law, would have conclusively exonerated and exculpated the Plaintiff of all the baseless and unfound charges in the indictment aforestated.

e. The defendants Nadjari and Wolfe did wilfully and wantonly trick and deceive the Plaintiff into executing a purported Waiver of Immunity, and voluntarily testifying as a witness before the grand jury, on the false and fraudulent representations and assurances to him by Wolfe that the grand jury subpoena issued to him was merely for the purpose of a general "John Doe" investigation, and that the Plaintiff was in no manner a subject or target of investigation or accusation therein; that in total reliance thereon, the Plaintiff did thereupon execute the said Waiver of Immunity, and did immediately offer his complete cooperation by appearing as a witness before the grand jury; whereas, as the defendants then and there well knew and concealed from the Plaintiff, the representations so made to him were absolutely false and fraudulent, and were made solely for the wrongful purpose and design of

tricking the Plaintiff into appearing as a witness before the Grand Jury and to mislead him into executing the Waiver of Immunity aforesaid, and thereby to attempt to entrap and impact the Plaintiff into a baseless charge of perjury; and that in pursuance thereof, the defendants did thereupon immediately pounce upon the Plaintiff, as a witness before the grand jury, with irrelevant and improper questions without laying any evidentiary foundation therefore, and without giving to the Plaintiff any opportunity to recall, explain or clarify his responses thereto, as required by law.

f. In furtherance of the wilful deceptions and trickery practiced against the Plaintiff as aforesaid, and with the intent to cover up the same, the defendants Nadjari and Wolfe did thereafter illegally, venally and corruptly forge, alter and materially change the contents of the purported Waiver of Immunity aforesaid.

g. The defendants Nadjari, Wolfe, Federici, Roberts and the Daily News, individually and in concert with each other, did further maliciously and wilfully deprive the Plaintiff of his rights, privileges and immunities secured by the Constitution and the Laws of the United States by deliberately planting and disseminating into the news media, more particularly, in the columns of the defendant Daily News, a pattern of false, prejudicial and inflammatory news releases and newspaper stories, during the sitting of the Grand Jury and long prior to the finding of an indictment against the Plaintiff as aforestated, namely that he, various members of his staff, and other unnamed judges and other public servants, had committed various crimes including bribery and larceny; that his Law Secretary was a "no show" individual; that the Plaintiff had been "removed" from office by the Presiding Justice of the Appellate Division; that he had been "suspended"

from his duties as a Civil Court Judge; that he had been "indicted" by the grand jury for the alleged crimes based on the unfounded rumors aforesaid; all with the pernicious object and design to generate a prejudicial climate of hostility, rancor and guilt against the Plaintiff, as well as against other judges and public officials, and to poison the minds of the citizenry, grand jurors and potential petit jurors against this Plaintiff and his Law Secretary, and other public servants, into voting a baseless indictment against, the Plaintiff, as well as his Secretary, as aforestated.

h. The defendants Nadjari, Wolfe, Mullin, Higgins, Butcher, Sachson and other divers persons presently unknown, did maliciously and wantonly arrest the Plaintiff without any probable cause therefor, as aforestated; and upon information and belief, under an indictment which had not yet been voted upon or handed up by the grand jury; and on a bench warrant issued before the indictment had been signed and approved by the Grand Jury, which arrest was effected for the sole and ulterior purpose and design of forestalling, sabotaging and preventing the Plaintiff from lawfully arresting the defendants Nadjari and Wolfe for the sundry state and federal crimes committed by them against the Plaintiff in the grand jury proceedings aforestated, as follows: Forgery (Penal Law 170.10, 170.25); Official Misconduct (Penal Law 195.00); Hindering Prosecution (Penal Law 205.50); Conspiracy (105.10); Offering a False Instrument (Penal Law 175.25); Coercion (Penal Law 135.60); Criminal Solicitation (Subornation of Perjury, Penal Law 100.00); Criminal Facilitation (Penal Law 115.00); Unlawful Imprisonment (Penal Law 135.00); Unlawful Disclosure of an Indictment (Penal Law 215.75); Unlawful Grand Jury Disclosure

(Penal Law 215.70); Wilful Deprivation of Constitutional Rights (18 United States Code 242); Conspiracy Against Rights of Citizens (18 United States Code 241), among others.

SECOND COUNT

13. Plaintiff repeats and realleges all the allegations contained in paragraphs 1 to 12 inclusive hereinabove, with the same force and effect as if set forth fully herein.

14. The defendants within named, did maliciously, unlawfully, wilfully, venally, oppressively and in complete bad faith, conspire to impede, obstruct, hinder and defeat the due course of justice in the County of Kings, State of New York, with intent to injure him and his property for lawfully enforcing or attempting to enforce his right to the equal protection of the laws, in that the said defendants, by trick and device, and by fraud and deception, and in complete bad faith, did deliberately prevent, impede, sabotage and defeat the Plaintiff's lawful right and privilege to arrest the defendants Nadjari and Wolfe for the crimes committed by them as hereinabove set forth, by means and manner and in substance as follows:

a. On April 17, 1974, at about 10:30 A.M., Plaintiff appeared at the 84th Precinct in Brooklyn, New York and duly requested the arrest of the defendants Nadjari and Wolfe for the crimes hereinabove set forth and duly submitted oral and documentary evidence therefor.

b. At about 11:20 A.M. of that day, the defendants Lieut. Higgins and Lieut. Mullin informed the Plaintiff that he had established sufficient evidence and probable cause to effect the arrest, and that they would arrest the defendants Nadjari and Wolfe forthwith.

c. The Plaintiff requested the said defendant Police Officers to withhold any publicity whatsoever of the scheduled arrest of the defendants aforesaid, and the defendants assured the Plaintiff that there would be no publicity until after the arrest.

d. However, in furtherance of the conspiracy aforesaid, at about 12 Noon of that day, while the formal police complaint was being drawn, the defendant Butcher, a Deputy Police Inspector, appeared at the 84th Precinct, and then and there, by fraud and deception, thwarted, impeded and defeated the intended arrest of the defendants Nadjari and Wolfe, and purposely delayed the arrest of the defendants and detained the Plaintiff in the 84th Precinct until the intended arrival of the defendants Lipson and Sachson. In furtherance thereof, two higher ranking police officers, the defendants Lipson and Sachson subsequently appeared at the 84th Precinct, and again, by continued ruse and deception, kept and detained the Plaintiff, and had the Plaintiff repeat over and over again the complaint previously submitted to the defendants Higgins and Mullin. Thereafter, in a ritual of further deception, the said defendants Lipson and Sachson caused the re-draft of the police complaint over and over again by the ruse of amending the original complaint with trivial matter, and purposefully omitting material matter, so that the complaint had to be retyped, in order to forestall the arrests as aforesaid.

e. Following these stalling and delaying tactics as aforestated, there soon appeared at the 84th Precinct a score or more of reporters from the press, radio and television, in violation of defendants' agreement of "no publicity" until after the arrest of Nadjari and Wolfe. The defendants Higgins, Mullin, Lipson, Sachson and Butcher

admitted to Plaintiff that they did transmit the Plaintiff's complaint against Nadjari and Wolfe over the "police wires".

f. That the object of the conspiracy aforesaid was to keep and detail the Plaintiff by ruse and deception, at the 84th Precinct for a period of over four hours, during which time the defendants Nadjari and Wolfe would have opportunity to convene the Special Grand Jury and thereby rush through the illegal and baseless indictment as hereinabove set forth, thus hindering, impeding, obstructing, sabotaging and defeating the Plaintiff's lawful right to arrest the defendants Nadjari and Wolfe for the crimes committed by them as aforestated.

g. Upon information and belief, that in the said rush of the defendants aforesaid to set up and frame the Plaintiff into an indictment, the said defendants wilfully deceived the Presiding Justice of the Extraordinary Term of the Supreme Court, the Hon. John M. Murtagh, into issuing a bench warrant thereunder, as to an indictment which had been prepared and typed up by Nadjari and Wolfe long before the finding thereof and which the defendant Nadjari signed before the indictment had been legally found by the Grand Jury or signed by the defendant foreman thereof.

h. Further, upon information and belief, that in their conspiratorial haste to obtain the said indictment against the Plaintiff and his law secretary, to avoid their own arrest, the defendants Najdari and Wolfe illegally had new pages substituted in the indictment aforesaid.

i. On the following morning about 7 A.M. of April 18, 1974, the Plaintiff was forcibly taken from his home by agents of the defendants Nadjari and Wolfe, under color of a warrant.

j. Instead of producing him forthwith in the Kings County Supreme Court, before Mr. Justice Murtagh, as directed by the bench warrant, and over the Plaintiff's vigorous protest, and in violation of his constitutional and statutory rights to the equal protection of the law, the Plaintiff was taken by the defendants' agents to the Borough of Manhattan, to the defendants' office at 2 World Trade Center; that further, he was denied the constitutional right to communicate with counsel; denied a prompt arraignment without unnecessary delay, and was held incomunicado by force, duress and threats for over 8 hours, until he finally was arraigned in the late afternoon before Mr. Justice Murtagh in the Kings County Supreme Court, where Plaintiff pleaded not guilty and was released upon his own recognizance.

k. On the following day, April 19, 1974, Plaintiff continued his attempt to arrest the defendants Nadjari and Wolfe, as prescribed by Sections 140.30 and 140.40 of the Criminal Procedure Law of New York. He begged, solicited and requested the assistance of approximately twelve police officers of the City of New York, all of whom refused. He applied to four judges of the Criminal Court of the City of New York having jurisdiction to issue a warrant of arrest therefor, all of whom denied the request except one, Judge Bruce McM Wright, who on Saturday, April 20, 1974, at about 1:30 A.M. did direct and order the issuance of a warrant for the arrest of the defendant Wolfe. The Honorable Bruce McM Wright thereafter deferred the issuance of the warrant pending further action by the District Attorney of New York County.

l. Thereafter, Plaintiff sought the assistance of the defendant Scoppetta as Commissioner of Investigation of the City of New York, who, in furtherance of the conspiracy aforesaid, did by ruse and deception, and in complete bad

faith, wantonly impede, obstruct, impair and defeat the Plaintiff's right to the equal protection of the laws, in that he deliberately misled and falsely advised the Plaintiff that he would undertake an investigation of his complaint against the defendants and duly act thereon, and did further falsely advise the Plaintiff that the matter was being investigated by a "Detective Caroll", whereas in truth and fact, on information and belief, there was no such person as "Detective Carroll" but that "Caroll" was a civilian working in one of the police precincts answering the telephone and in charge of the records.

m. On or about April 10, 1974, about nine days before the indictment was found, Plaintiff likewise presented all the evidence hereinabove set forth for grand jury action to the defendant Gold and his Assistant, concerning the crimes committed by the defendants Nadjari and Wolfe, as aforestated. Subsequently, on June 5, 1974, the Plaintiff re-presented the pertinent facts and documentary evidence to the defendant Gold and his Assistant and again requested that he, as District Attorney, present Plaintiff's array of evidence, consisting of named disinterested witnesses, including judges and court personnel, all of whom were then presently available to the Grand Jury. Defendant Gold thereupon advised Plaintiff that he would "hear from him shortly". In furtherance of the conspiracy aforesaid, Plaintiff's counsel subsequently received a message from the defendant Gold, by one of his assistants, asking Plaintiff whether he still wished to proceed with the investigation and prosecution of the defendants as aforesaid. The Plaintiff unequivocally repeated "yes".

In furtherance of the conspiracy aforesaid, the defendant by his Assistant, then asked Plaintiff whether he would be willing to make a written statement before a stenographer, and Plaintiff readily agreed to do so, and did as follows:

On June 5, 1974, Plaintiff again appeared before the defendant Gold and testified for about two hours, reiterating and repeating the charges previously set forth. Again defendant Gold informed Plaintiff he would "hear from them". Subsequently Plaintiff asked the defendant's Assistant for a transcript of his statement given as aforesaid, who promised to furnish it in about "two weeks". In further pursuance of the conspiracy aforesaid, Plaintiff did not, however, receive the transcript until approximately March 10, 1975, almost nine months later, after repeated requests therefor by Plaintiff and his counsel.

Upon information and belief, the defendant Gold has taken no action whatever on the Plaintiff's complaint to this date.

By reason of the facts aforestated, the defendant Gold did wantonly fail to present the evidence hereinabove set forth to the grand jury, and did wilfully shield, protect, immunize and cover up the defendants Nadjari and Wolfe for the crimes committed by them as aforesaid, all in flagrant violation of his duty and responsibility as the District Attorney of Kings County, and in wanton deprivation of Plaintiff's constitutional right to the equal protection of law.

THIRD COUNT

15. Plaintiff repeats and realleges the allegations contained in paragraphs 1 to 14, with the same force and effect as if set forth in detail herein.

16. The defendants Mullin, Higgins, Butcher, Sachson, Lipson, Scoppetta and Gold, with full knowledge of the wrongs done, and conspired to be done, and about to be committed against the Plaintiff as aforesaid, and having

power to prevent or aid in preventing the commission of the same, and by reasonable diligence could have prevented, did wrongfully refuse and neglect so to do and Plaintiff suffered serious damages thereby.

WHEREFORE, by reason of the premises aforestated, the Plaintiff suffered great mental anguish and serious emotional distress; and was subjected to great and irreparable humiliation, shame and embarrassment both to himself and his family; and was subjected to great physical pain and impairment of bodily function; and has been subjected to serious and irreparable damage to his reputation as a Judge and as an accredited member of the legal profession; and has suffered special damage to his current income and potential earning capacity, now and in the future, both as a lawyer and in his lifelong avocation and vocation as an established composer and author; and has been subjected to liability for legal expenses incurred thereby; and has thereby sustained damages, both compensatory and special, in the sum of Ten Million Dollars ($10,000,000.), against the defendants according to their respective liabilities; and for the malice, venality, fraud, deception, oppression and wanton deprivation of Plaintiff's civil and constitutional rights and denial of the equal protection of the law on the part of the defendants herein, the Plaintiff further requests punitive and exemplary damages against each of them in the sum of Ten Million Dollars ($10,000,000.), according to their respective liabilities, together with counsel fees, costs and disbursements of the within action.

Dated: April 14th, 1975

s/Fred G. Moritt
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AARON NUSSBAUM
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IN THE

Supreme Court of the United States

October Term, 1976

Supreme Court, U. S.
FILED
OCT 1
MICHAEL RODAK, JR., CL

No. 76-193

FRED G. MORITT,

Petitioner,

against

MAURICE H. NADJARI, KENNETH R. WOLFE, WILLIAM FEDERICI, JOSEPH MULLIN, JAMES HIGGINS, ADAM BUTCHER, JULES SACHSON, HYMAN LIPSON, JOSEPH HIRSCHMAN, person intended being the Foreman of the Grand Jury, "JANE ROE," person intended being the Secretary of the said Grand Jury, EUGENE GOLD and NICHOLAS SCOPPETTA,

Respondents,

SAM ROBERTS and NEW YORK NEWS, INC.,

Defendants.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS NADJARI, WOLFE, FEDERICI, HIRSCHMAN AND "ROE" IN OPPOSITION TO PETITION FOR CERTIORARI

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FRED G. MORITT,

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MAURICE H. NADJARI, KENNETH R. WOLFE, WILLIAM FEDERICI, JOSEPH MULLIN, JAMES HIGGINS, ADAM BUTCHER, JULES SACHSON, HYMAN LIPSON, JOSEPH HIRSCHMAN, person intended being the Foreman of the Grand Jury, "JANE ROE," person intended being the Secretary of the said Grand Jury, EUGENE GOLD and NICHOLAS SCOPPETTA,

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Preliminary Statement

Petitioner Fred G. Moritt seeks a writ of certiorari to review the judgment of the United States Court of Appeals

for the Second Circuit made and entered April 5, 1976 (KAUFMAN, Ch.J., ANDERSON and MESKILL, JJ.) reversing the order of the United States District Court for the Eastern District of New York (Chief Justice JACOB MISHLER) dated August 28, 1975, and dismissing petitioner's civil rights action against the respondents, instituted pursuant to 42 U.S.C. §§1938, 1985 and 1986. Petition for rehearing and for rehearing *en banc* was denied on May 14, 1976.

Opinions Below

The order and memorandum decision of the United States District Court, Eastern District of New York (Chief Judge JACOB MISHLER), dated August 28, 1975, is set forth in the appendix to petitioner's brief (1a-9a).

The order and memorandum decision of the United States Court of Appeals for the Second Circuit, dated April 5, 1976, and order of modification thereof, dated May 18, 1976, are set forth in the appendix to petitioner's brief (10a-12a, 13a).

The order and memorandum decision of the United States Court of Appeals denying rehearing, and denying rehearing *en banc,* are set forth in the appendix to petitioner's brief (14a, 15a).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §1343(3).

Question Presented

Whether this Court's holding in *Imbler* v. *Pachtman,* 96 S.Ct. 984, is applicable in this case to bar petitioner's claim under 42 U.S.C. §§1983, 1985, 1986.

Statutes Involved

The statutes involved are 42 U.S.C. §§1983, 1985 and 1986, and are set forth in the appendix to petitioner's brief (16a-17a).

Statement of the Case

By an indictment (Ind. #SPO K-13-74) filed April 17, 1974, the Extraordinary Special Grand Jury for the County of Kings charged Fred G. Moritt, a judge of the Civil Court of the City of New York with the crimes of conspiracy in the third degree (N.Y. Penal Law §105.05 [McKinney 1967]), grand larceny in the second degree (N.Y. Penal Law §155.35 [McKinney 1967]), perjury in the first degree (two counts) (N.Y. Penal Law §210.15 [McKinney 1967]), and tampering with a witness (N.Y. Penal Law §215.10 [McKinney 1967]). Specifically, the indictment alleges that from June, 1972, to January, 1974, Moritt agreed and thereby conspired with Theodore Mann and others to commit the crime of grand larceny and in furtherance of that conspiracy to cause Mann "to be placed on the New York City payroll at a salary of $18,500 a year under the pretense that Mann would perform services as a Law Secretary in the Civil Court of the City of New York." According to this arrangement, Mann received this salary

and then made these funds available to Moritt for production of a play; in addition, Moritt hired a law school graduate at one hundred dollars per week to occupy a desk in his chambers and "create the impression that a Judge's Law Secretary was in attendance and performing work in the Civil Court." Consequently, from about September 18, 1972, to about January 24, 1974, the conspiracy netted Moritt a total of $26,050 stolen from the City of New York. The indictment further alleges that Moritt testified falsely before the grand jury concerning the "no show" job, and intentionally made a false statement to a grand jury witness attempting to affect the witness's testimony.

Subsequent to the filing of the indictment, Moritt moved in the New York Supreme Court, Appellate Division, Second Department (N.Y. Judiciary Law §149(2) [McKinney 1967]), for an order dismissing the indictment on the grounds (*inter alia*) that the Special State Prosecutor, who presented the case to the grand jury, did not have jurisdiction over the case; that the evidence before the grand jury was insufficient; and that he had engaged in various forms of misconduct. The Appellate Division, in a memorandum opinion dated November 12, 1974, denied the motion. *Moritt* v. *Nadjari,* 46 A.D.2d 784 (2d Dept. 1974).

Shortly after the denial of his initial motion to dismiss, Moritt petitioned the Appellate Division, Second Department, for an order pursuant to Article 78 of the New York Civil Practice Law and Rules prohibiting hs prosecution on the grounds that the state statutes allowing for an Extraordinary Term of the Supreme Court and for a Special Prosecutor were unconstitutional and that various state

statutes had rendered his offenses nonindictable. His petition was dismissed on the merits without opinion. *Matter of Moritt* v. *Extraordinary Special and Trial Term of Supreme Court of Kings County,* 46 A.D. 2d 1012 (2d Dept. 1974), *appeal dismissed,* 36 N.Y. 2d 911 (1975), *leave to appeal denied,* 37 N.Y. 2d 707 (1975). On December 15, 1975, the United States Supreme Court dismissed Moritt's appeal from the Appellate Division. 96 S.Ct. 557 (1975).

By a complaint dated April 14, 1975, Moritt brought the instant civil rights action in the United States District Court for the Eastern District of New York against the herein named people. The first count of the complaint alleged, pursuant to 42 U.S.C. §1983, that Nadjari, the special state prosecutor, and Wolfe, an assistant prosecutor, concealed from the grand jury evidence exonerating Moritt; that they misled the grand jury by calling witnesses who had no knowledge about events occurring after September, 1974; that they failed to tell the grand jury that Moritt's actions were governed by state court administrative rules and were not indictable; that they, along with the foreman and secretary, prevented Moritt from testifying or calling witnesses before the grand jury; that they tricked Moritt into appearing before the grand jury solely to "impact" him into a "baseless charge of perjury"; that they forged and materially altered the waiver of immunity signed by Moritt; that Nadjari, Wolfe, Federici, Roberts, and the *Daily News* disseminated inflammatory stories about Moritt prior to the indictment; and that Nadjari, Wolfe, and Police Officers Mullin, Higgins, Butcher, and Sachson arrested Moritt without probable cause, on a bench warrant issued before the indictment was filed, solely to prevent Moritt from effecting a citizen's arrest of Nadjari and Wolfe.

The second count alleged, pursuant to 42 U.S.C. §1985, that the defendants conspired to prevent Moritt from arresting Nadjari and Wolfe, and specifically that District Attorney Gold, Commissioner Scoppetta, and the police officers at various times failed to act on Moritt's complaints. The third count alleged, pursuant to 42 U.S.C. §1986, that Gold, Scoppetta, and the police officers, having knowledge of the wrongful acts about to be committed against Moritt, neglected to prevent them, and that Moritt thereby suffered serious damages. In conclusion, Moritt demanded ten million dollars in compensatory and special damages and ten million dollars in punitive damages.

Special State Prosecutor Nadjari, representing himself, Wolfe, Federici, Hirschman, and "Roe," moved to dismiss the complaint on the grounds that the court lacked jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief could be granted. Specifically, the defendants submitted that, as required by 42 U.S.C. §§1985 and 1986, Moritt failed to claim a denial of equal protection of the laws on the basis of racial or otherwise class-based discrimination; that the complaint concerned "violations, if any, of state, not constitutional law [which] are not proper subjects of a claim for relief under the Civil Rights Statutes"; that the allegations of the complaint were "too vague and unparticularized to state a constitutional claim"; that the purpose of the action was to seek review of the state proceedings in the Appellate Division, Second Department; and that the Special State Prosecutor, Special Assistant Attorney General, Grand Jury Foreman, and Grand Jury Secretary were immune from liability. District Attorney Gold moved to dismiss

on the same grounds, and Commissioner Scoppetta and the police officers moved to dismiss on the ground that the complaint failed to state a claim upon which relief could be granted.

After oral argument on July 18, 1975, Chief Judge Mishler rendered a memorandum and order on August 27. The court noted that "While not all of the allegedly violated rights are of constitutional dimensions, as for example, the allegedly prejudicial press releases, *Martin* v. *Merola,* 389 F. Supp. 323 (S.D.N.Y. 1975), nevertheless the preponderance of the charges in Count 1 do allege sufficient constitutional violations to state a claim under §1983." The court further stated that the complaint should not be dismissed because it is "inartfully pleaded and the possibility of ultimate success may be remote * * *. It is not impossible, however unlikely, that plaintiff will be able to prove some of the facts which will support his claims." As to the question of immunity, the court said that "officials such as Nadjari and Wolfe * * * should not be permitted to escape responsibility for their misconduct by hiding behind the shield of immunity. Hirschman and 'Jane Roe' on the other hand, as foreman and secretary of the Grand Jury respectively, performed a judiciary function and are therefore immune from suit." Accordingly, the court granted the motion to dismiss count one as to the defendants Hirschman and "Jane Roe," and denied it as to Nadjari, Wolfe, Federici, and Police Officers Mullin, Higgins, Butcher and Sachson. The court dismissed counts two and three against all defendants on the grounds that the defendants therein were charged with committing purely discretionary official functions, not a racial or class-based deprivation of equal protection. The court included in its

order a statement that the sufficiency of the first count "presents a substantial ground for difference of opinion"; that "the trial will involve many complex issues," and that an "immediate appeal may materially advance the ultimate termination of the litigation."

On September 5, 1975, Judge MISHLER granted a stay of the federal proceedings pending defendants' appeal to the Second Circuit.

By an order dated October 9, 1975, the Second Circuit, acting pursuant to 28 U.S.C. §1292(b), granted Nadjari, Wolfe and Federici permission to appeal. On October 22, Moritt filed a notice of appeal from the dismissal of count one against Hirschman and "Jane Roe" and of counts two and three. The Special Prosecutor moved to dismiss the appeal as untimely. On November 20, 1975, the Second Circuit denied the motion with leave to renew it on appeal.

On April 5, 1976, the United States Court of Appeals for the Second Circuit (KAUFMAN, Ch. J., ANDERSON, MESKILL, JJ.), reversed the order and judgment of the District Court, insofar as it had sustained the first count of the complaint as to the respondents Nadjari, Wolfe and Federici, upon the ground that the petitioner's civil rights action brought pursuant to 42 U.S.C. §1983 was barred by this Court's holding in *Imbler* v. *Pachtman,* 96 S.Ct. 984.

On May 14, 1976, the Court of Appeals denied the petition for a rehearing, and for rehearing *en banc.*

POINT I

The prosecutors and grand jurors have absolute immunity from civil liability.

This Court has now definitively held that prosecutors receive absolute immunity from civil suit when the challenged activities were an integral part of the judicial process. *Imbler* v. *Pachtman,* 96 S.Ct. 984, *aff'g* 500 F. 2d 1302 (9th Cir. 1974). In that case, the plaintiff, relying upon the post-conviction findings of a federal court granting him a writ of habeas corpus, charged that the state prosecutor and investigators working at his direction had intentionally and negligently permitted perjured testimony against Imbler and suppressed evidence which would have exonerated him. The Supreme Court affirmed the dismissal of Imbler's complaint, holding that prosecutors, like judges and legislators, enjoy absolute immunity from suit for their official acts. Rejecting the claim that prosecutors should receive no more than the qualified immunity received by state executive officials, the Court wrote:

> "If a prosecutor had only a qualified immunity, the threat of §1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of a prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's ad-

> vocate. * * * Further, if the prosecutor is made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." At 992

Absolute immunity "defeats a suit at the outset, so long as the official's actions were within the scope of the immunity." *Id.* at 989 n.13. Absolute immunity likewise applies to grand jurors. *Id.* at 991 n.20. *Imbler* v. *Pachtman, supra,* thus required the dismissal of the instant complaint against Nadjari, Wolfe and Federici of the Special Prosecutor's Office, as well as affirmance of the District Court's dismissal as to grand jurors Hirschman and "Roe."

The alleged wrongdoings by the prosecutors were undertaken pursuant to their official functions. Indeed, almost all the allegations involve the prosecutors' conduct as counsel to the grand jury and their duties under state law in presenting evidence, instructing the grand jury on the law, and receiving waivers of immunity from witnesses. *See* N.Y. Criminal Procedure Law §§190.25 (2)(a) and (6), 190.45, 190.50 (2), (3) and (6) (McKinney 1971). These activities fall within a prosecutor's "duties of initiating * * * a criminal prosecution," *Imbler* v. *Pachtman, supra,* at 990 and "deciding which suits to bring." *Id.* at 992. Moritt's additional allegation that defendants directed an arrest pursuant to a court-ordered bench warrant was automatically immunized as an act carried out under a court directive. Moreover, under *Imbler,* it was a necessary action in furtherance of commencing a criminal prosecution.

Notably, too, the claims in the instant case are utterly frivolous when compared to those in *Imbler,* in which a

crucial witness allegedly perjured himself on material matters. For example, Moritt submitted in the District Court statements of various persons as evidence of what was suppressed. The statements concern when these persons saw Theodore Mann, plaintiff's law secretary, in Moritt's chambers; they shed no light whatever on whether Moritt was diverting Mann's salary to his own use. Further, in *Imbler,* the plaintiff already had the benefit of a court decision holding that the prosecutor culpably used false testimony leading to plaintiff's conviction. In the instant case, however, most of Moritt's claims of misconduct, i.e., suppression of evidence, forgery, use of misleading evidence, improper legal instructions to the grand jury, have been, in one form or another, decided against him. *See, e.g., Moritt* v. *Nadjari,* 46 A.D. 2d 784 (2d Dept. 1974); *Matter of Moritt* v. *Extraordinary Special and Trial Term of Supreme Court of Kings County,* 46 A.D. 2d 1012 (2d Dept. 1974), *appeal dismissed,* 36 N.Y. 2d 911 (1975), *leave to appeal denied,* 37 N.Y. 2d 707 (1975), *appeal dismissed,* —— U.S. ——, 96 S.Ct. 557 (1975).

Finally, it appears that the dissemination of news releases, allegedly prejudicing Moritt's right to a fair trial, concerned either the crimes with which Moritt was charged or matters of public record, and did not connect him with unrelated criminal activity. *Cf. Martin* v. *Merola,* 532 F. 2d 191 (2d Cir. Feb. 5, 1976). As such, the alleged actions would also be immunized as taken pursuant to a prosecutor's duty to inform the public of pending criminal proceedings. In any event, as discussed more fully in Point II, *infra,* this Court in *Martin* v. *Merola, supra,* has ruled that such a claim must await the outcome of a criminal trial

before it can be determined that a fair trial was rendered impossible by the news releases.

In sum, the complaint alleges acts which are within the prosecutors' and grand jurors' scope of authority and which are thereby immunized. The court correctly held that the grand jurors are immune from suit. The complaint against Nadjari, Wolfe and Federici was correctly dismissed.

POINT II

The civil rights damage suit should await the outcome of the pending state criminal prosecution against Moritt.

Respondents contend that Moritt's civil rights damage suit was being improperly employed to secure both federal review of his state pretrial proceedings and discovery for his criminal trial. For this reson alone, the suit should be dismissed until the state criminal prosecution has been completed.

On February 5, 1976, this Court in *Martin* v. *Merola,* 532 F. 2d 191 (2d Cir. 1976), *vacating* 389 F. Supp. 323 (S.D.N.Y. 1975), directed that a similar suit be dismissed as premature. Specifically, this Court noted that the question of whether the right to a fair trial was violated by a prosecutor's dissemination of news releases could not be determined until after the state trial was completed. In addition to the practical necessity for awaiting the outcome of state proceedings, this Court noted that a federal court's inquiry into a pending prosecution would cause the same

interference as an action to enjoin a prosecution. As a matter of federalism and comity, such intervention is generally to be avoided. *See Younger* v. *Harris,* 401 U.S. 37 (1971); *Samuels* v. *Mackell,* 401 U.S. 66 (1971).

In the instant case, Moritt has made allegations of suppression of evidence in the grand jury, forgery of a waiver of immunity, arrest without probable cause, and, as in *Martin,* dissemination of prejudicial news releases. Most of these questions have been decided adversely to Moritt in pretrial proceedings in the Appellate Division, *see Moritt* v. *Nadjari,* 46 A.D. 2d 784 (2d Dept. 1974), and some are being litigated again in the state trial court. Whatever impact the alleged misconduct may have on Moritt's right to a fair trial can only be determined after the trial is completed. Moreover, all issues which have been preserved by the pretrial motions and proceedings can be raised on an appeal from a judgment of conviction. Finally, Moritt has submitted no claims of bad faith, inadequate remedy in the state courts, or blatantly unconstitutional statutes such as would permit a federal court to intervene in a pending state prosecution. *See Younger* v. *Harris, supra* at 48-55. All issues should first be resolved in the state trial and appellate proceedings before resort is had to the federal courts.

The Second Circuit further held that pretrial damage suits "represent a drain on already overextended judicial and prosecutorial resources." In addition,

> "* * * the requirement that defendants wait until criminal proceedings have terminated before asking a federal court for damages against the prosecutor will tend to eliminate those suits which might be brought for

purposes of harassment." *Martin* v. *Merola, supra* at 195.

In this context, Moritt's suit should clearly be dismissed. As noted above, the issues should first be resolved in the pending state proceedings. More importantly, Moritt's express design to use his interrogatories from the instant suit for his criminal defense constitutes not only a drain on prosecutorial resources, if not outright harassment, but a blatant misuse of the Civil Rights Act. The proper forum for pretrial discovery is in the state trial court.

In sum, the principles of practicality in litigation, comity and federalism, conservation of prosecutorial and judicial resources, and avoidance of harassment, as elucidated by this Court, all require dismissal of the complaint at this time.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: September, 1976

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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-193

FRED G. MORITT,

Petitioner,

-against-

MAURICE H. NADJARI, KENNETH R. WOLFE, WILLIAM FEDERICI, JOSEPH MULLIN, JAMES HIGGINS, ADAM BUTCHER, JULES SACHSON, HYMAN LIPSON, JOSEPH HIRSCHMAN, person intended being the Foreman of the Grand Jury, "JANE ROE," person intended being the Secretary of the said Grand Jury, EUGENE GOLD and NICHOLAS SCOPPETTA,

Respondents,

SAM ROBERTS and NEW YORK NEWS, INC.,

Defendants.

PETITIONER'S REPLY BRIEF

I

In opposition to the petition for certiorari, the Respondents Nadjari, Wolfe, Federici, Hirschman, and "Roe,"* contend that "most of Moritt's claims of

*The respondents Gold and Scoppetta have filed no response in opposition to the petition for certiorari.

misconduct, i.e., suppression of evidence, forgery, use of misleading evidence, improper legal instructions to the grand jury, have been, in one form or another, decided against him. See, e.g. *Moritt v. Nadjari*, 46 A.D.2d 784 (2d Dept. 1974); *Matter of Moritt v. Extraordinary Special and Trial Term of Supreme Court of Kings County*, 46 A.D.2d 1012 (2d Dept. 1974) appeal dismissed, 36 NY 2d 911 (1975), leave to appeal denied, 37 NY 2d 707 (1975), appeal dismissed, ——U.S.——, 96 S.Ct. 557 (1975)". (Resp. Br. p. 11).

In reply, we respectfully invite the Court's attention to the fact that at no time had Petitioner been granted an evidentiary hearing, *on the merits*, by the state courts on the crucial issues of wilful suppression of vital exculpatory evidence, the wrongful use of misleading evidence, or the deliberate thwarting of the Petitioner's absolute right to effect a citizens' arrest of the Respondents Nadjari and Wolfe, based upon conceded probable cause, for the serious crimes committed by them against Petitioner prior to and throughout the course of the grand jury proceedings.

Indeed, in the very brief submitted by the Respondent Nadjari to this Honorable Court in *Moritt v. Extraordinary Special and Trial Term of Supreme Court, supra*, under Docket No. 75-648, p. 13 ff. he flatly conceded and acknowledged to this Court, as follows:

> "The question of alleged prosecutorial misconduct was not presented to the Appellate Division in the instant prohibition proceeding. Indeed, under state law, appellant would have been unable to raise the issue on a petition for a writ of prohibition. See note, p. 14, infra. *The question of prosecutorial misconduct remains to be resolved in the trial court.*" (emphasis added).

II

Again, in a patently unsupportable attempt to equate the special factual pattern of *Imbler v. Pachtman*, 96 S.Ct. 984, with the extremely gross prosecutorial misconduct portrayed at bar, the Respondents represent to this Honorable Court that the Petitioner's arrest "pursuant to a court-ordered bench warrant was automatically immunized as an act carried out under a court directive." [*Resp.Br.-p.10*]. The fact is, however, that the Petitioner's arrest, and the bench warrant issued thereunder, without probable cause therefor, had been wrongfully and maliciously instigated and procured by the Respondents in a nefarious conspiracy to sabotage the Petitioner's right to effect the Respondents' arrest for the sundry serious crimes committed by them, as aforestated. (*App.p.27a*]. It is significant, in this connection, to note that the Respondents failed to file any indictment against Petitioner until April 17, 1974, coincidentally the very day that the latter unsuccessfully sought the arrest of the Respondents Nadjari and Wolfe for the criminal acts committed by them. The Petitioner had, in fact, petitioned the Governor to investigate the Respondent Nadjari's misconduct as early as April 8, 1974, and on April 10, 1974 had laid his evidence before the District Attorney of Kings County, which went unheeded and as a result, the Respondent obtained the "quickie" indictment against him.

III

The Respondents have failed in any way to controvert the Petitioner's contention that the Court of Appeals erred in applying the *Imbler* holding, which accorded absolute immunity to state prosecutors, equally to the Respondent Federici, an employee of the Respondent Nadjari. [*Pet. pp. 13-14*]. It was clearly never the holding nor the intention of

the Supreme Court to grant absolute immunity to a prosecutor's press agent, loaned to the Respondent Nadjari by the Daily News, a co-defendant in this case.

IV

In opposition to the petition for grant of certiorari herein, the Respondents now assert that the civil rights action instituted by the Petitioner should await the outcome of the pending state criminal prosecution. (*Resp. Br. Point II*), citing *Martin v. Merola,* 532 F.2d 191 (CA 2, 1976).

We respectfully submit, in reply, that the pivotal question presented by the decision of the United States Court of Appeals below dwelt essentially on the issue of prosecutorial immunity. Accordingly, *Martin v. Merola, supra,* cited by the Respondents, should not foreclose this Honorable Court from presently determining the propriety of the ruling below that the Respondents were entitled to absolute immunity under the extraordinary factual pattern at bar.

In any event, it should be noted that the holding in *Martin v. Merola* should be strictly limited to its own facts centering on a prosecutor's prejudicial dissemination of news releases and its impact on a defendant's right to a fair trial. Such an issue may indeed properly await the outcome of a criminal trial, in order to determine whether the defendant had been prejudiced thereby. Here, however, altogether different is the wilful suppression of vital exculpatory evidence, as alleged in the complaint at bar, which is inherently prejudicial and ought not be made to depend upon the outcome of a criminal trial in order to assess or consider its fundamental impact upon the defendant's right to a fair trial.

V

Compounding the allegations of gross prosecutorial misconduct systematically practiced by the Respondents at bar, we respectfully call the Court's attention to the recent decision of the Appellate Division of the Supreme Court, Second Judicial Department, dated August 11, 1976, *In the Matter of Fred G. Moritt Petitioner, v. Maurice H. Nadjari, Deputy Attorney General, et al., respondents,* finally declaring that the Respondent was utterly without jurisdiction to *investigate* or prosecute the indictment against Petitioner. In its holding that the Respondent usurped jurisdiction, the Appellate Division definitively stated:

> "In light of the recent decision of the Court of Appeals in *Matter of Dondi v. Jones* (——NY 2d——, dec. June 3, 1976), mot. for rearg. den. —— NY 2d—— July 6, 1976), which held that the superseding jurisdiction of the Special Prosecutor under the Executive Order in question is to be confined strictly to the criminal justice process or system, it is clear that the indictment should be prosecuted by the District Attorney of Kings County since the acts charged do not relate to the criminal justice process or system."

In this connection, it is inexplicable that the Respondents' Brief has completely ignored the decision of the highest court, the New York Court of Appeals, in the *Dondi* case *supra,* as a result of which *Moritt v. Nadjari,* 46 AD 2d 784, cited in Respondents' brief, pp. 4, 13, was rendered obsolete as aforenoted.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: September 29, 1976.

Respectfully submitted,

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